

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**BRUCE A. WYNNE**

Claimant

VS.

**CONTINENTAL SUPPLY CHAIN SERVICES**

Respondent

AND

**ZURICH AMERICAN INSURANCE COMPANY**

Insurance Carrier

Docket No. 1,035,161

**ORDER**

Respondent and its insurance carrier (respondent) appealed the January 2, 2015, Post-Award Medical Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Board placed this appeal on its summary docket for disposition without oral argument.

**APPEARANCES**

Randy S. Stalcup of Andover, Kansas, appeared for claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent.

**RECORD**

The record considered by the Board is listed in the May 27, 2011, Award and the January 2, 2015, Post-Award Medical Award.

**ISSUE**

Claimant alleged he suffered a series of repetitive injuries to his back and right hip from constant standing, walking and lifting while performing his job duties for respondent. Respondent disputed claimant's series of repetitive injuries arose out of and in the course of his employment, timely notice and the nature and extent of claimant's disability. The ALJ found claimant's claim compensable and awarded claimant a 78.5% work disability. The Board affirmed the ALJ in all respects, with the exception of changing the date of accident to June 22, 2007. The Board found claimant suffered work-related injuries to his back and right hip and had an 11% whole person functional impairment. Specifically, the

Board determined claimant aggravated his preexisting lumbar spine and right hip conditions.

On March 31, 2014, claimant filed an application for post-award medical benefits requesting appointment of an authorized physician for a right hip replacement. Claimant asserts his need for a right hip replacement is the direct and natural consequence of his June 22, 2007, work accident.

Respondent asserts claimant's need for a hip replacement is not a direct and natural consequence of his June 22, 2007, work accident, but, rather, is the natural progression of claimant's preexisting osteoarthritis.

ALJ Klein found claimant's accidental injury aggravated and accelerated his need for treatment and ordered respondent to provide claimant with a list of three physicians from which to choose an authorized treating physician. Respondent appeals.

The issue on appeal is whether claimant's need for a right hip replacement is a direct and natural consequence of his June 22, 2007, work accident.

#### **FINDINGS OF FACT**

After reviewing the record and considering the parties' briefs, the Board finds:

Claimant began working as a supply technician in 2005 through a temporary agency and respondent hired him in February 2006. Claimant has not worked since leaving respondent's employment on January 12, 2010. His daily routine consists of getting up at 7 a.m., showering, eating breakfast, watching television until 5 p.m., going out and playing dominoes for two hours, returning home, watching more television and going to bed. Claimant does not actively exercise.

According to claimant, a right hip replacement has been recommended for several years. He previously did not want to undergo right hip replacement surgery because he was able to get around with pushing his carts<sup>1</sup> and taking medication. He wants the hip replacement because his hip condition and his ability to perform everyday activities have worsened. Claimant acknowledged nothing specific caused his right hip condition to worsen.

At the request of his attorney, claimant was evaluated by Dr. Daniel D. Zimmerman on August 13, 2008. That was the only occasion claimant was seen by Dr. Zimmerman, who has an internal medicine practice and is a board-certified independent medical

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<sup>1</sup> Presumably, claimant meant flatbed and push carts he used at work to move and deliver medical supplies.

examiner. Dr. Zimmerman indicated that x-rays of claimant's right hip demonstrated findings consistent with early avascular necrosis and osteoarthritic change, which the doctor opined was aggravated by and causally related to claimant's repetitive work activities. Dr. Zimmerman indicated claimant would ultimately be a candidate for a right total hip replacement.

In his report, Dr. Zimmerman indicated claimant underwent surgery for hammertoes and bunions in 2007. The doctor noted that claimant felt his lumbosacral spine and right hip pain had worsened as a result of developing an abnormal gait after surgery for the hammertoes and bunions. Dr. Zimmerman opined claimant's hammertoes and bunions were not work related.

In a letter dated March 31, 2014, responding to a letter from claimant's counsel, Dr. Zimmerman indicated a right total hip replacement was necessitated by the accident described in his August 13, 2008, report.

Dr. Zimmerman indicated claimant's avascular necrosis, which he explained is a lack of blood supply to the ball of the right hip joint, was a preexisting degenerative condition. The doctor testified:

Q. Right. So in Mr. Wynne's case, wouldn't you agree, Doctor, that the avascular necrosis, the altered gait that he's had in the past because of his feet problem, and the work activities that he had all are contributing factors to the complaints he has in his hip?

A. It's reasonable.

Q. And if his condition has worsened since he's last worked, Doctor, would you agree that the work would be less of a factor than the regular normal course of avascular necrosis?

A. It was the factor up to and including the time period that he was working and accelerated the process, and then the process as you're probably thinking or wanting me to think will continue. I mean, once avascular necrosis is there, it doesn't get better.

Q. Right. And it wasn't going to get better whether or not he had a work accident or had bad feet. It wasn't going to get better no matter what happened; correct?

A. That's my thinking, yes.<sup>2</sup>

Dr. Charles D. Pence is an orthopedic surgeon who performs hip replacements and hip surgery. He treated claimant for hip pain from December 7, 2007, through January 15,

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<sup>2</sup> Zimmerman Depo. (Aug. 1, 2014) at 23-24.

2009, and on October 2 and 5, 2012. The doctor's December 7, 2007, notes indicated x-rays showed severe arthritic changes of the hips with osteophytes and spurring. Dr. Pence's impressions were osteoarthritis of the right hip, degenerative spondylosis of the lumbar spine and status post hammertoe repair. On January 15, 2009, claimant complained he was experiencing more pain in his right hip and also in his left hip.

Dr. Pence's October 2, 2012, notes indicate claimant's hip pain had worsened and he wanted something done. The doctor observed claimant had a bilateral antalgic gait and used a cane on the left, because his right hip was the worst.

In a letter dated May 9, 2014, to claimant's attorney, Dr. Pence stated:

He asked in the letter my opinion with reasonable degree of medical certainty whether work duties represent the necessity of the hip replacement procedure. It is difficult to evaluate how much this could contribute. It is my understanding he has been on restricted activities for a number [of] years and has not worked since 2009. [The cause] of his arthritis is probably multifactorial. There are genetic components. His avascular necrosis may be related to the sickle cell trait that he carries. Certainly the degree of arthritis he has had over the years his symptoms would've been aggravated by weight[-]bearing type of activities and being on his feet for long periods of time.<sup>3</sup>

Dr. Pence testified claimant has osteoarthritis. The doctor testified he never diagnosed claimant with avascular necrosis. Dr. Pence testified he has not seen claimant for two years and does not know his current condition. He testified claimant's right hip osteoarthritis is multifactorial. The doctor explained claimant's right hip condition could be related to wear and tear changes, his weight, a genetic component and a degree of hip dysplasia. He also testified claimant's altered gait from his feet issues would be temporary and would have little effect on his osteoarthritis, but could aggravate his symptoms.

On cross-examination, Dr. Pence acknowledged work activities could be a factor in the aggravation of claimant's right hip osteoarthritis. He indicated that by the time he saw claimant in October 2012, claimant's right hip had worsened radiographically; by that, the doctor meant narrowing of the joint space, more cyst formation in the acetabulum and the femur head and, according to claimant, worsening of symptoms. Dr. Pence indicated the worsening of claimant's symptoms was a natural progression of his osteoarthritis.

Respondent's counsel described to Dr. Pence claimant's work history and activities with respondent and the fact claimant has not worked since 2010. Respondent's counsel then asked Dr. Pence if claimant would have needed right hip surgery had he not performed all of those work activities. Dr. Pence's reply was, "I would doubt, based on when I saw him in 2007 that you can say it would have made any appreciable difference

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<sup>3</sup> Pence Depo., Ex. 2.

in the long run. I think he would have eventually needed the hip replacement no matter what he was doing.”<sup>4</sup> The doctor later testified claimant likely would have needed a right hip replacement had the 2007 accident not occurred. Dr. Pence also testified:

Q. And that kind of gets me to this point, is the current need for his hip replacement surgery, can that be tied back to that work as described here (indicating), versus just the osteoarthritic condition?

A. I really can't separate it out. I said he will eventually need hip surgery assuming he lived long enough. This may have made it occur faster, and I suspect that it did.<sup>5</sup>

. . .

Q. . . . Would the hip replacement be the direct and natural consequence of his work injury?

A. The primary reason to go to a total hip is the amount of pain and discomfort a person is having. I would expect activities like that to increase his pain, it makes him more likely to go ahead and choose to do a total hip.

Q. Make him more symptomatic?

A. Yes.

Q. Would it change the actual physical structure of the osteoarthritis though?

A. Over a long enough period, yes.<sup>6</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>7</sup> “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>8</sup>

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<sup>4</sup> *Id.* at 12.

<sup>5</sup> *Id.* at 16.

<sup>6</sup> *Id.* at 27-28.

<sup>7</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>8</sup> K.S.A. 2006 Supp. 44-508(g).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>9</sup>

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>10</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>11</sup> An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.<sup>12</sup>

K.S.A. 2006 Supp. 44-551(i)(1) states, in part:

[T]he board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2006 Supp. 44-555c(a) states, in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

Board review of a judge's order is de novo on the record.<sup>13</sup> The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and

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<sup>9</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

<sup>10</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

<sup>11</sup> *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

<sup>12</sup> *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

<sup>13</sup> See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

conclusions previously made by the judge.<sup>14</sup> The Board, on de novo review, makes its own factual findings.<sup>15</sup>

K.S.A. 2006 Supp. 44-510k(a) states:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

The Board affirms the Post-Award Medical Award. The Board recognizes that Dr. Zimmerman saw claimant one time, in 2008, and rendered his opinions based upon that single examination. The Board is also aware that Dr. Pence testified approximately two years after he last saw claimant. A more recent physical examination of claimant by a physician to determine if a right hip replacement was necessary to cure or relieve the effects of his accidental injury would have been helpful. Drs. Zimmerman and Pence agreed claimant needed a right hip replacement. Dr. Zimmerman opined claimant's need for a right total hip replacement was necessitated by work activities described in his August 13, 2008, report. He also indicated claimant's work accelerated his avascular necrosis. Dr. Pence testified claimant's need for a right hip replacement was accelerated by the work he performed for respondent.

Respondent argues claimant's preexisting osteoarthritis was not caused by his work activities. That issue was extensively litigated. The Board found claimant's work injury aggravated his preexisting right hip condition and, therefore, he sustained personal injury by accident arising out of and in the course of his employment with respondent. The Board will not and cannot revisit that issue. In *Bazil*,<sup>16</sup> the Kansas Court of Appeals stated:

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<sup>14</sup> See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

<sup>15</sup> See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

<sup>16</sup> *Bazil v. Detroit Diesel Central Remanufacturing*, No. 99,613, 2008 WL 5401467 (Kansas Court of Appeals unpublished opinion filed Dec. 19, 2008).

Our Supreme Court has held that workers compensation awards, like other monetary installments, represent a final judgment with each payment, which cannot later be modified or dissolved. *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 394, 44 P.3d 330 (2002); *Ferrell v. Day & Zimmerman, Inc.*, 223 Kan. 421, 423, 573 P.2d 1065 (1978). In both *Acosta* and *Ferrell*, our Supreme Court was faced with requests to modify workers compensation awards under K.S.A. 44-528. *Acosta*, 273 Kan. at 394, 44 P.3d 330; *Ferrell*, 223 Kan. at 423, 573 P.2d 1065. In both cases, the court held that a modification hearing was not the proper means to attack the validity of the original award. Rather, a party must appeal the original award pursuant to the workers compensation appeals procedure. *Acosta*, 273 Kan. at 394, 44 P.3d 330; *Ferrell*, 223 Kan. at 423, 573 P.2d 1065.

### CONCLUSION

Claimant's need for a right hip replacement is a direct and natural consequence of his June 22, 2007, work accident.

**WHEREFORE**, the Board affirms the January 2, 2015, Post-Award Medical Award entered by ALJ Klein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 2015.

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BOARD MEMBER

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BOARD MEMBER

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